DEC 11 2000

No. 99-1613

IN THE

Supreme Court of the United States

ROBERT SHAW, et al.,

Petitioners,

—vs.—

KEVIN MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS WATCH AND SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENT

ELIZABETH ALEXANDER
MARGARET WINTER
DAVID C. FATHI
National Prison Project of the
American Civil Liberties
Union Foundation
1875 Connecticut Avenue, N.W.,
Suite 410
Washington, DC 20009
(202) 234-4830
Attorneys for American Civil Liberties Union

DANIEL L. GREENBERG
JOHN BOSTON
Counsel of Record
MARY LYNNE WERLWAS
Legal Aid Society
Prisoners' Rights Project
90 Church Street
New York, New York 10007
(212) 577-3530
Attorneys for Legal Aid Society

(Counsel continued on inside front cover)

BEST AVAILABLE COPY

JAMIE FELLNER
Human Rights Watch
350 Fifth Avenue
New York, New York 10018
(212) 216-1212
Attorney for Human Rights Watch

STEPHEN BRIGHT
TAMARA SERWER
Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, Georgia 30303-2122
(404) 688-1202
Attorneys for Southern Center for Human Rights

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Prisons Have an Inherent and Persistent Tendency to Suppress Criticism of Official Misconduct 5

A. Prisons' unique isolation from society shields abuse from public view and accountability 6

B. Prisons are characterized by a pervasive caste system that encourages abuse by ensuring impunity for official misconduct .. 6

C. Prisoners who complain about official misconduct face harsh sanctions from their jailers 14

II. The First Amendment Does Not Permit Prisons to Punish Prisoners Solely for Criticizing Official Misconduct 17

A. The Court has never permitted prisons to impose content or viewpoint-based restrictions on prisoners' speech 17

B. Under the standard of *Turner v. Safley*, punishment of prisoner speech about official misconduct violates the First Amendment 19

1. The prison punished Respondent's speech solely because it criticized official misconduct 20

2. Punishment on this basis is not rationally related to a neutral, legitimate government interest 22

III. The Punishment of Respondent Violated the First Amendment Right to Engage in Speech Concerning Litigation 26

IV. The Punishment of Respondent Denied Due Process Since the Rules Do Not Give Adequate Notice That They Forbid Speech about Staff Misconduct 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Alnutt v. Cleary, 27 F. Supp. 2d 395 (W.D.N.Y. 1998) 16

Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) 5

Bell v. Wolfish, 441 U.S. 520 (1979) 18

Blair v. City of Pomona, 223 F.3d 1074 (9th Cir. 2000) 9

Brandon v. Allen, 645 F. Supp. 1261 (W.D. Tenn. 1986) 9, 10, 11

Castle v. Clymer, 15 F. Supp. 2d 640 (E.D. Pa. 1998) 16

Chambers v. Baltimore & Ohio R., 207 U.S. 142 (1907) .. 27

Chatin v. Coombe, 186 F.3d 82 (2d Cir. 1999) 29

Cleavinger v. Saxner, 474 U.S. 193 (1985) 5, 6, 10, 16

Cornell v. Woods, 69 F.3d 1383 (8th Cir. 1995) 15

Downey v. Denton City, 119 F.3d 381 (5th Cir. 1997) 20

Feliciano v. Colon, 704 F. Supp. 16 (D.P.R. 1988) 16

Garrison v. Louisiana, 379 U.S. 64 (1964) 17

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 17, 28

Grayned v. City of Rockford, 408 U.S. 104 (1972) 28

Hines v. Gomez, 108 F.3d 265 (9th Cir. 1997) 15

Houston v. Hill, 482 U.S. 451 (1987) 23

Jeffes v. Barnes, 208 F.3d 49 (2d Cir.), *cert. denied*, 121 S. Ct. 47 (2000) 9, 10

Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) 18, 19

Kesler v. King, 29 F. Supp. 2d 356 (S.D. Tex. 1998) 11

Lewis v. Casey, 518 U.S. 343 (1996) 26

Lowrance v. Coughlin, 862 F. Supp. 1090 (S.D.N.Y. 1994) 16

Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) 9

Mathie v. Fries, 121 F.3d 808 (2d Cir. 1997) 20

McLin v. City of Chicago, 742 F. Supp. 994 (N.D. Ill. 1990) 9

Meriwether v. Coughlin, 879 F.2d 1037 (2d Cir. 1989) 9, 16

NEA v. Finley, 118 S. Ct. 2168 (1998) 29

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 17, 23, 30

Newby v. District of Columbia, 59 F. Supp.2d 35 (D.D.C. 1999) 12

Newsom v. Norris, 888 F.2d 371 (6th Cir. 1989) 15

Perry v. McGinnis, 209 F.3d 597 (6th Cir. 2000) 10

Procunier v. Martinez, 416 U.S. 396 (1974) 15, 19

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 28

Rizzo v. Dawson, 778 F.2d 527 (9th Cir. 1985) 26

Ryland v. Shapiro, 708 F.2d 967 (8th Cir. 1983) 27

Sharp v. Houston, 164 F.3d 923 (5th Cir. 1999) 9, 10

Sheppard v. Phoenix, 91 Civ. 4148 (RPP) (S.D.N.Y. 1998) 13

Smylis v. City of New York, 25 F. Supp.2d 461 (S.D.N.Y. 1998) 9

Superintendent v. Hill, 472 U.S. 445 (1985) 30

Swans v. City of Lansing, 65 F. Supp.2d 625 (W.D. Mich. 1999) 11

In Re Texas Prison Litigation, 191 F.R.D. 164 (W.D. Mo. 1999) 11

Thornburgh v. Abbott, 490 U.S. 401 (1989) 18, 19

Turner v. Safley, 482 U.S. 78 (1987) 4, 17, 18, 19, 25

West v. Atkins, 487 U.S. 42 (1988) 5, 7

White-Ruiz v. City of New York, 983 F. Supp. 365 (S.D.N.Y. 1997) 9

Women Prisoners of District of Columbia DOC v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) 12, 13

ADDITIONAL AUTHORITIES

Attica: The Official Report of the New York State Special Commission on Attica (Bantam Books 1972) 15

Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275 (1999) 8, 9, 10, 14, 16

Rick Bragg, *Prison Chief Encouraged Brutality, Witnesses Report*, New York Times, July 1, 1997 12

Paul Chevigny, *Police Power* (1969) 14, 16

The City of New York Commission to Investigate Allegations of Police Corruption, Commission Report (1994) 9

Ted Conover, *Newjack: Guarding Sing Sing* (2000) 10

Christopher Drew, *Rikers Island Guards Made "House of Pain" for Inmates*, N.Y. Times, August 16, 1998 13

Ex-Guard is Sentenced in Beating at Rikers, N.Y. Times, April 5, 1997 13

Myriam E. Gilles, *Breaking the Code of Silence*, 80 Boston U. L. Rev. 17 (2000) 9

Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 Int. J. Crim. & Penology 69 (1973) 8, 14

Norman Hayner & Ellis Ash, *The Prison as A Community*, 5 Am. Soc. Rev. 575 (1940) 7

Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996) 13, 16, 17, 20

Human Rights Watch, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons* (1998) 17

Human Rights Watch, *Shielded From Justice* (1998) 9, 10, 16

James B. Jacobs, *Stateville* (1977) 6, 7, 15

Inmate Beatings Decrease, but Continue, at Rikers, N.Y. Times, March 1, 1997 13

James W. Marquart, *Prison Guards and the Use of Physical Coercion as A Mechanism of Prisoner Control*, 24 Criminology 347 (1986) 7, 9

Payment Offer in Rikers Abuse Suit, N.Y. Times, February 15, 1996 13

Steve J. Martin & Sheldon Ekland-Olson, *Texas Prisons* (1987) 6, 7, 15

Mike McPhee, *Vigilante Guards May Do Time*, Denver Post, July 27, 2000 12

Jerome H. Skolnick & James J. Fyfe, *Above the Law* (1993) 7, 8, 9, 10, 14

U.S. Dept. of Justice, *Findings of Investigation of State Juvenile Justice Facilities* 13

S. Kirson Weinberg, *Aspects of the Prison's Social Structure*, 47 Am. J. Soc. 717 (1942) 7, 8, 14

Philip Zimbardo, *The Pathology of Imprisonment, reprinted in* Lawrence F. Travis III, *Corrections: An Issues Approach* 99 (1983) 8, 9

INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Thus, the ACLU has a particular interest in the punishment of prisoners for exercising rights guaranteed by the First Amendment to the United States Constitution.

The Legal Aid Society of the City of New York is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and where necessary conducts class action litigation on prison conditions and mistreatment and brutality against prisoners.

Human Rights Watch is a private non-profit and non-partisan organization that works to promote respect for international human rights worldwide. In the United States, one of its key priorities for the past decade has been conditions of confinement for adults and children. Through research, reporting and advocacy Human Rights Watch publicizes human rights violations and promotes policies and practices that will prevent abuses against inmates and detainees and hold

---

[1]No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

accountable those who commit them. Human Rights Watch has a strong interest in efforts to punish inmates for communicating information about official misconduct: such communications are an important means by which prisoners protect their right to be free of abuse and are a vital source of information about conditions behind prison walls.

For nearly 25 years, the Southern Center for Human Rights, a private non-profit organization, has been engaged in litigation, public education and advocacy to protect the civil and human rights of persons confined in the prisons and jails of the South. The Center challenges unconstitutional practices in prisons and jails by bringing lawsuits on behalf of the imprisoned, and by providing free legal assistance to prisoners challenging brutality or the conditions of their confinement. In 1998, the Center settled *Anderson v. Garner*, a case involving brutal beatings of hundreds of prisoners at the direction of the Commissioner of the Georgia Department of Corrections. The Center was forced to seek a protective order to prevent retaliation against the officers who testified against the prison.

SUMMARY OF ARGUMENT

Respondent Kevin Murphy, assigned to work as an inmate law clerk, wrote to another prisoner informing him that a prison guard who had accused that prisoner of assault had himself engaged in serious misconduct. Rather than investigate the allegations, petitioners, Montana State Prison officials (hereafter "the prison") punished Mr. Murphy, without any showing that his letter was false or malicious, and despite an explicit finding his conduct did *not* impair prison security. They claim, in effect, an unfettered right to punish prisoners who complain about abuse by prison guards.

To legitimize such retaliatory punishment would further institutionalize a culture of impunity within prisons. Prisons

exhibit an enduring tendency to suppress criticism of official misconduct occurring behind their walls. Their insularity from mainstream society and their coercive mandate combine to create an environment in which abuse of authority is an ever-present danger, yet accountability is drastically diminished. The result is a pervasive prison culture of extreme loyalty by staff, including the rigid "code of silence" by which staff and supervisors shield one another from accountability. Prisoners who complain about abuse or criticize their jailers are targeted by prison staff for retaliation in order to secure their silence. By ensuring impunity, this culture fosters abuse and permits cover-ups on a scale virtually impossible in free society.

The speech that the prison punished--peaceful criticism of a government officer--is at the core of First Amendment protection. The prison had no substantial security or other justification for punishing it, and indeed absolved Mr. Murphy of charges of violating security. The prison had no rule prohibiting prisoners from corresponding, nor any restriction governing to whom inmate law clerks could write. Rather, the prison disciplined Mr. Murphy because of the contents of his letter, concluding that relating information about misconduct by a correctional officer violated prison rules against "insolence" and "interference with due process hearings," even without any finding that the information was false, malicious, or intended to harass the staff.

The Ninth Circuit Court of Appeals correctly concluded that the First Amendment protected the communication here, relying in part on circuit precedent concerning application of the First Amendment to inmate law clerks. In our view, under more general free speech principles, any prisoner has a First Amendment right to communicate information concerning official misconduct, subject to reasonable restrictions on the manner in which the communication is made. Thus the Court need not address Mr. Murphy's inmate law clerk status.

The government may limit prisoner speech in ways that are reasonably related to legitimate and neutral government interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). But the Court has never upheld the type of restriction presented here, in which discipline is imposed *solely* because the speech was critical of prison staff. And it should not do so, because punishment of speech criticizing staff has no reasonable relationship to any legitimate, neutral government interests, and the government has no legitimate, neutral interest in suppressing it. Punishing this speech is an exaggerated response to security interests. This result does not jeopardize prisons' authority to enforce legitimate restrictions on prisoner speech, such as rules that ensure that speech takes place in an orderly and non-dangerous manner; or rules that prohibit communication among certain classes of prisoners, as in *Turner*; or restriction of material that is hazardous to prison security. It does mean that prisons cannot punish someone solely for communicating information about official misconduct that the authorities find unwelcome.

Additionally, Mr. Murphy's punishment was unconstitutional because prison rules did not adequately provide notice that they proscribe this type of communication. A prisoner could not be expected to know that a private communication with another prisoner could constitute "insolence" against an officer who did not even overhear the statement. Nor could a prisoner presume that identifying witnesses for a prisoner involved in a criminal proceeding, or providing information critical of staff, would be prohibited as "interfering with a due process hearing." Nor is there a shred of evidence in the record to show that Mr. Murphy's statements were false.

ARGUMENT

I. Prisons Have an Inherent and Persistent Tendency to Suppress Criticism of Official Misconduct.

"All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 235 (1987) (Scalia, J., dissenting). In particular, government prefers to silence criticism of itself. This tendency is particularly pronounced in prisons, because of their isolation from public scrutiny, and their authoritarian task and accompanying unique social structure. *See West v. Atkins*, 487 U.S. 42, 56 n.15 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 203-05 (1985).[2] These institutional features not only provide fertile ground for abuses of the prison's coercive power, but also operate in predictable ways to shield officials who misuse their power from accountability.

In this closed, secretive environment, the government wields its maximum authority to suppress dissent and conceal

---

[2]In both these cases, the Court acknowledged how the nature of the prison can distort official conduct to the detriment of prisoners' rights. In *West*, discussing prison medical care, the Court acknowledged:

> [T]hat correctional setting, specifically designed to be removed from the community, inevitably affects the exercise of professional judgment. Unlike the situation confronting free patients, the nonmedical functions of prison life inevitably influence the nature, timing, and form of medical care provided to inmates. . . . [S]tudies of prison health care, and simple common sense, suggest that [the] delivery of medical care was not unaffected by the fact that the State controlled the circumstances and sources of a prisoner's medical treatment.

487 U.S. at 56 n.15.

In *Cleavinger*, the Court recognized similar institutional pressures distorting the conduct of prison disciplinary hearing officers. 474 U.S. at 203-05; *see infra* at 10.

misconduct. To grant prison authorities more tools to suppress criticism -- as the prison seeks here -- is to invite abuse of that power. Prisons' code of silence and corollary pattern of covert retaliation and outright suppression of dissent already make it extremely difficult to uncover and redress abuse by prison staff. Permitting prisons to punish prisoners who truthfully complain of misconduct serves only further to insulate officials from accountability and to perpetuate abuse.

A. Prisons' unique isolation from society shields abuse from public view and accountability.

Prisons are singularly isolated from the outside world. In other public institutions, "the openness. . . and supervision by the community afford significant safeguards against. . . abuses," in contrast to the "jailhouse[,] where the door is closed, not open. . . and where there is little, if any, protection by way of community observation." *Cleavinger*, 474 U.S. at 205.

Prisons have clung to this insularity, deeply resisting efforts to open their doors to community oversight or increased communication between prisoners and the outside. *See* James B. Jacobs, *Stateville* 29 (1977); Steve J. Martin & Sheldon Ekland-Olson, *Texas Prisons* 23-25, 81-82, 176-77, 185-202 (1987) (describing resistance of prisons to reforms). Isolation permits misconduct to occur with impunity from the outside world's standards of accountability, and makes it exceedingly difficult to observe or investigate abuses within prisons.

B. Prisons are characterized by a pervasive caste system that encourages abuse by ensuring impunity for official misconduct.

Prisons officials occupy a unique social world due to their role as agents of an isolated and "inherently coercive

institution" (*West v. Atkins*, 487 U.S. at 56 n.15) tasked with using force to achieve institutional goals. Prisons share this feature with police: this "fundamental culture" of law enforcement "is everywhere similar. . . since everywhere the same features of the police role--danger, authority and the mandate to use coercive force--are present. This combination generates and supports norms of internal solidarity or *brotherhood*." Jerome H. Skolnick & James J. Fyfe, *Above the Law* 92 (1993); *see id.* at 95-98; *see also* James W. Marquart, *Prison Guards and the Use of Physical Coercion as A Mechanism of Prisoner Control*, 24 Criminology 347, 361 (1986) (explaining how "coercion builds solidarity"). Far beyond mere professional allegiance, the solidarity of the prison staff is part of a strict caste system, a profound "dichotomy between 'us' and 'them.'" Martin, *supra*, at 23; S. Kirson Weinberg, *Aspects of the Prison's Social Structure*, 47 Am. J. Soc. 717, 719-720 (1942); Skolnick, *supra*, at 111. "The division into 'cons' and 'screws' (guards) in prison society is even more basic than the Middletown dichotomy into workers and businessmen. . . Just as the Southern cotton plantation during slavery times exhibited a sharp division into two major groups. . . so also does the American prison." Norman Hayner & Ellis Ash, *The Prison as A Community*, 5 Am. Soc. Rev. 575, 578 (1940).

Maintaining these deep divisions is critical, as "the guard's only basis for authority is his rank within the caste system." Jacobs, *supra*, at 179. In prison, "a separate moral order emerged for prison officials and for staff. An officer's status in the [corrections] community, his sense of purpose and of right and wrong, were all dependent on approval from the authoritarian regime." Martin, *supra*, at 23. Loyalty to fellow staff members becomes the paramount concern. *Id.*; Jacobs, *supra*, at 202; Skolnick, *supra*, at 111, 122; Weinberg, *supra*, at 724. "In the closed society of. . . departments that see themselves and the public in terms of 'us' and 'them' and adopt

the siege view of the world, the pressure to remain loyal is enormous." Skolnick, *supra*, at 111; *see also* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275, 1306 (1999) (discussing "the siege mentality, the us/them attitude. . . the blue wall of silence, and the elevation of loyalty over integrity" of police culture). Disloyalty thus is perceived not only as a break in group cohesiveness, but as a direct threat to the authoritarian prerogatives of all members of the law enforcement caste.[3]

The well known law enforcement "code of silence" flows directly from this system, as the caste structure fosters an "attitude of fierce loyalty and protectiveness within the ranks to

---

[3]Loyalty in the caste system is "inherent in the prison situation [and] can neither be controlled nor modified by any single individual of either group. In fact, the individuals who do not conform to these group representations are considered variants and subject to the controls and pressures of their respective stratum." Weinberg, *supra*, at 26.

The force of this observation was demonstrated in the classic Stanford study by Philip Zimbardo, which created a mock prison and randomly assigned students as prisoners and guards. Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 Int. J. Crim. & Penology 69 (1973). The experiment was shut down early because of the "frightening" results, as students took to their roles with alarming intensity. Philip Zimbardo, *The Pathology of Imprisonment, reprinted in* Lawrence F. Travis III, *Corrections: An Issues Approach* 99, 100 (1983); Haney, at 80-81. One third of the guards became "tyrannical in their arbitrary use of power." *Id.* at 101; Haney, at 85-86, 88-89. Although others were more benign,

> no good guard ever interfered with a command by any of the bad guards; they never intervened on the side of the prisoners, they never told the others to ease off because it was only an experiment, and they never even came to me as prison superintendent or experimenter in charge to complain. . . . In a sense, the good guards perpetuated the prison more than the other guards because their own needs to be liked prevented them from disobeying or violating the implicit guards' code.

Zimbardo, at 101; *accord* Haney, at 94.

the point that officers refuse to address or report each other's misconduct." *Sharp v. Houston*, 164 F.3d 923, 935 (5th Cir. 1999); *see also* Marquart, *supra*, at 361.[4] The code of silence "consist[s] in a single rule: an officer does not provide adverse information against a fellow officer. . . . all police officers adhere to this rule, even good ones. It is a formidable barrier to the investigation of complaints about the police." *Blair*, 223 F.3d at 1081 (quoting *Report of the Independent Commission on the Los Angeles Police Department* 168 (1991).

The code of silence is equally well entrenched in prisons and jails. *See, e.g., Jeffes v. Barnes*, 208 F.3d 49, 52-53, 62 (2d Cir.), *cert. denied*, 121 S. Ct. 47 (2000) (describing code of silence in jails and retaliation against officer who reported beating of prisoners); *Meriwether v. Coughlin*, 879 F.2d 1037, 1049 (2d Cir. 1989) (citing Commissioner's testimony that "corrections officers generally adhere to a 'code of silence' and lie to conceal other officers' assaults on prisoners"); *Smylis v. City of New York*, 25 F. Supp.2d 461, 463 (S.D.N.Y. 1998) (jail supervisor's acknowledgment of code); *Madrid v. Gomez*, 889 F. Supp. 1146, 1156 & n.4 (N.D. Cal. 1995) ("undeniable presence of code of silence" at prison was direct cause of pattern of brutality; testimony about existence of code); Zimbardo, *Pathology*, *supra*, at 101.

The code not only encompasses passive silence, but

---

[4]For additional finidngs about the code of silence, *see Blair v. City of Pomona*, 223 F.3d 1074, 1081 (9th Cir. 2000); *White-Ruiz v. City of New York*, 983 F. Supp. 365, 379 (S.D.N.Y. 1997)); *McLin v. City of Chicago*, 742 F. Supp. 994, 1001-02 (N.D. Ill. 1990); *Brandon v. Allen*, 645 F. Supp. 1261 (W.D. Tenn. 1986); Skolnick, *supra*, at 108-112; The City of New York Commission to Investigate Allegations of Police Corruption, Commission Report (1994) (Mollen Commission); Human Rights Watch ("HRW"), *Shielded From Justice* 68-69 (1998); Bandes, *supra*, at 1306-07; Myriam E. Gilles, *Breaking the Code of Silence*, 80 Boston U. L. Rev. 17, 66-88 (2000).

"also takes the active forms of covering up wrongdoing, and lying under oath." Bandes, *supra,* at 1326. It adheres throughout the ranks: supervisors not only lie to protect staff, but affirmatively avoid learning of misconduct so as not to discipline staff.[5] *Id.;* Skolnick, *supra,* at 7,122; HRW, *Shielded From Justice,* at 44-45; *Brandon,* 645 F. Supp. at 1266. The demands of loyalty also skew internal disciplinary proceedings, for as this Court recognized, staff "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." *Cleavinger,* 474 U.S. at 204.

> [Committee members] are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Id.; see also Perry v. McGinnis, 209 F.3d 597, 605-06 (6th Cir. 2000) (finding prison had quota on number of inmates who could be acquitted of disciplinary charges). Or, as one guard summarized, "We'd never act as a witness for an inmate." Ted Conover, *Newjack: Guarding Sing Sing* 284 (2000).

The code of silence encourages abuse by ensuring impunity:

> The code of silence . . . permitted and condoned police misconduct as surely as a written rule expressly immunizing officers from any inquiry into acts of violence. If Memphis had any nominal rule forbidding

[5] *See, e.g., Jeffes,* 208 F.3d at 53-54, 58, 60-61 (finding jail leadership accountable for cover-up by staff); *Sharp,* 164 F.3d at 936 (supervisors participate in maintaining code of silence).

> police violence, it was little more than a dead letter. The police officers who knew of the mistreatment of civilians uniformly suppressed that information, and their supervisors, although well aware that criminal conduct was being concealed in this manner, made no apparent effort to impose sanctions on any of the officers involved in the cover-up.

Brandon v. Allen, 645 F. Supp. at 1266-67, 1271.

In these circumstances, abuse and cover-ups are rampant. For example, in a Texas jail, a videotape showed an egregiously abusive search in which a riot squad forced unresisting prisoners to lie on the floor, kicked and beat them, used stun guns, forced them to crawl naked on their stomachs, and unleashed dogs who mauled and bit several prisoners. *See In Re Texas Prison Litigation,* 191 F.R.D. 164, 166-167 (W.D. Mo. 1999); *Kesler v. King,* 29 F. Supp.2d 356, 362-63 (S.D. Tex. 1998). For months, prison authorities engaged in a pattern of cover-up and lies about the incident. *Kesler,* 29 F. Supp.2d at 363-364. Officials refused to view the videotape of the incident, ignored grievances, lied to their superiors, and stonewalled efforts by outside agencies to investigate the abuses. *Id.* at 363-65. The abuse and cover-up were revealed only when numerous television stations broadcast the videotape months later; even then, the warden continued to maintain that it was merely a "training tape." *Id.* at 365.[6]

Similar examples abound of the type of egregious abuses that occur within prisons:

[6] *See also Swans v. City of Lansing,* 65 F. Supp.2d 625, 632-35, 650 (W.D. Mich. 1999) (judgment for estate of prisoner who died after guards beat him, noting "but for the video [tape of incident], there would have been no contradictory evidence to the testimony of the Defendants" and that the "City even tried to suppress or alter the Coroner's report").

--In Georgia, corrections officers testified about a mass beating in which riot guards punched, kicked and stomped on prisoners, stepped on their heads or smashed their heads into walls, and dragged a prisoner by his hair, while the Commissioner watched. Staff initially denied the facts of the incident out of fear of retaliation from other guards. *See* Rick Bragg, *Prison Chief Encouraged Brutality, Witnesses Report*, N.Y. Times, July 1, 1997.

--Guards at a District of Columbia jail forced female prisoners to engage in "sex shows including nude and semi-nude dancing" while guards watched, and ordered one prisoner to place a cigarette in her vagina. *Newby v. District of Columbia*, 59 F. Supp.2d 35, 37 & n.2 (D.D.C. 1999). A prisoner who refused to participate was beaten by staff. *Id.* at 36. The Court observed:

> What is particularly troubling is that these horrendous activities that took place at the City jail only surfaced when [the prisoners] complained about them. It is inconceivable how improper sexual activities involving the entire prison population of Southeast I, with inmates numbering between eight and one-hundred and three prison guards on duty as well as the presence of other prison guards from other parts of the prison could have occurred with no one putting an immediate stop to them.

Id.; see Women Prisoners of D.C. DOC v. D.C., 93 F.3d 910, 914, 929-31 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (earlier findings of rampant sexual abuse at D.C. jail and retaliation against those who complained).

--In 1995, staff at a federal prison in Florence, Colorado banded together to systematically beat prisoners whom they believed disrespected their authority. Mike McPhee, *Vigilante Guards May Do Time*, Denver Post, July 27, 2000, *at* http://www.denverpost.com/news/news0727.htm. One guard

admitted that staff would claim that the prisoner had attacked the guard, sometimes inflicting self-injuries to bolster the cover-up. By last summer, three officers reportedly had been convicted of criminal offenses for the set-ups. *Id.*

--In New York City, corrections officers engaged in a longterm pattern of severely beating prisoners in a jail segregation unit and falsifying reports to make it appear that the prisoners had attacked the officers. *Ex-Guard is Sentenced in Beating at Rikers*, N.Y. Times, April 5, 1997, at 27; Christopher Drew, *Rikers Island Guards Made 'House of Pain' for Inmates*, N.Y. Times, August 16, 1998, at A-1, 36. Cover-ups were routine: for example, an officer beat a prisoner and then faked an injury, rubbed carbon paper on his skin to simulate bruises, and upon orders of a captain, wrote a false report claiming the prisoner had attacked him. *Inmate Beatings Decrease, but Continue, at Rikers*, New York Times, March 1, 1997, at B-1; Drew, *supra*, at 36. The City settled a civil class action based on the excessive use of force with payment of $1.6 million (*Payment Offer in Rikers Abuse Suit*, N.Y. Times, February 15, 1996), and injunctive relief entered in 1998. *Sheppard v. Phoenix*, 91 Civ 4148 (RPP) (S.D.N.Y. 1998).

--In Georgia's juvenile detention centers, a 1997 investigation by the U.S. Justice Department revealed widespread patterns of excessive force and abusive discipline, inadequate procedures to investigate misconduct, and a systemic failure to report abuse. *See* U.S. Dept. of Justice, *Findings of Investigation of State Juvenile Justice Facilities*, *at* http://www.usdoj.gov/crt/split/documents/gajuvfind.htm.

Allowing prisons to conceal or cover up abuse only perpetuates abuse. Given the gravity of abuses in prison and the extraordinary lengths staff will go to keep them hidden, to condone the silencing of those who speak out against abuse is particularly dangerous. It is not sufficient that prisoners can

report abuse individually to outside correspondents if they cannot discuss it among themselves. Individual complaints of mistreatment are not likely to be taken seriously because of the impaired credibility of convicts and the status of prison staff as law enforcement personnel. And even when a prisoner's complaint is so serious or so undeniable that it must be heeded, the impulse of those in authority is to dismiss it as an aberration that does not reflect a larger problem. *See* Bandes, *supra*, at 1305-09. It is only when patterns of misconduct are unearthed that individual complaints are given due credence and the need for broader corrective measures is recognized. And those patterns will not be uncovered if prisoners are forbidden to speak among themselves of their experiences at the hands of their keepers.

C. Prisoners who complain about official misconduct face harsh sanctions from their jailers.

Prisoner complaints about staff misconduct are perceived by staff as direct challenges to their institutional authority. *See* Paul Chevigny, *Police Power* 136-38 (1969); Skolnick, *supra*, at 102; Haney, *supra*, at 93-94. This stems from the view underlying the "us vs. them" mentality that staff must be held blameless:

> The inmates and officials are two segregated strata. . . Modes of deference and obedience are expected by the officials, and expressions of authority are anticipated and tolerated by the inmates. . . . Through isolation the members of each group develop logically extreme positions. . . . [Thus] the custodians believe that they are 'always right' and that the prisoners are 'always wrong.'

Weinberg, *supra*, at 719-20. Thus prisons have traditionally punished harshly inmates who criticize misconduct by staff:

> An inmate who challenged the system and called attention to himself. . . would find himself on the coal pile for years, in isolation on a stringent diet, or salted away in segregation for an indefinite term. . . . More extreme was the punishment inflicted upon those few inmates who dared to directly challenge [the warden's] authority by complaining to the outside. . . [or] defying an officer. . . Such inmates could be expected to be beaten by the captains and lieutenants or by their specially selected inmate helpers.

Jacobs, *supra*, at 50, 203.

The most overt method of punishing criticism is express prohibition of complaints about staff. Until the Court struck down such rules in *Procunier v. Martinez*, 416 U.S. 396 (1974), prisons prohibited prisoners from "criticizing policy, rules or officials," or "belittling staff or our judicial system or anything connected with Department of Corrections." *Id.* at 415; *see* Jacobs, *supra*, at 50 (Stateville required letters be "respectful and decent in every way, containing no. . . remarks derogatory to the institution" and disciplined inmates "for the offense of criticizing Stateville"); Martin, *supra*, at 24 (Texas prohibitions on criticism to avoid "damaging publicity" and minimize "outside interference"); *Attica: The Official Report of the New York State Special Commission on Attica* 60 (Bantam Books 1972) (New York prohibitions on criticism).

Since then, prisons have pursued the same end through different means by retaliating against prisoners who complain or who reveal staff misconduct. Retaliatory measures include physical violence; transfers, denials of jobs, or other punishments; and pretextual disciplinary charges.[7] This use of

---

[7] *See Hines v. Gomez*, 108 F.3d 265, 267-69 (9th Cir. 1997) (disciplinary charges filed in retaliation for exercise of First Amendment rights); *Cornell v. Woods*, 69 F.3d 1383, 1386-89 (8th Cir. 1995) (staff retaliation against prisoners who reported staff misconduct to internal affairs); *Newsom v. Norris*, 888 F.2d 371, 373, 375-77 (6th Cir. 1989)

"cover charges," well known from the police context (*see* Chevigny, *supra,* at 136-46; Bandes, *supra,* at 1333 n.362; HRW, *Shielded from Justice* at 20, 51), is particularly insidious in prison, since the many rules and restrictions of prison life provide innumerable possible false charges. Unlike the outside, there is almost never anyone but prisoners or guards who can refute such false allegations. The pervasive bias of the prison's internal disciplinary system against prisoners (*see Cleavinger,* 474 U.S. at 203-05), further erodes any likelihood that the guard's deception will be revealed.

An analysis by Human Rights Watch of staff sexual abuse of women prisoners in several states illustrates these phenomena: virtually every woman who complained of sexual abuse by staff was subjected to retaliation in the form of disciplinary cover charges, loss of good time credits, removal from programs, or prolonged periods of segregation. HRW, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 5-6, 43, 89, 95, 124, 155, 252-262, 313-14 (1996). Retaliation was directly linked to the bias of prison grievance systems. In almost every case, authorities assumed that the prisoner lied about the misconduct, and refused, absent medical reports or non-inmate witnesses, to credit prisoner testimony. *Id.* at 5, 91, 172, 252-56. Staff were reluctant to report misconduct

---

(retaliation against inmate disciplinary assistants who complained about the disciplinary board chairman's performance); *Meriwether*, 879 F.2d at 1040, 1046 (prisoners transferred for being "outspoken critics of administration" and "corresponding with state officials and public interest organizations about the problems" at the prison); *Alnutt v. Cleary*, 27 F. Supp.2d 395, 397 (W.D.N.Y. 1998) (false disciplinary charges, assault, and faked positive drug test in retaliation for First Amendment exercise); *Castle v. Clymer*, 15 F.Supp.2d 640, 657, 663-67 (E.D. Pa. 1998) (retaliation for, *inter alia*, statements to newspaper reporter about prison); *Lowrance v. Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994) (retaliation and segregation for protected activity); *Feliciano v. Colon*, 704 F. Supp. 16 (D.P.R. 1988) (beating and tear-gassing of prisoner who complained to court).

observed in fellow staff. *Id.* at 156-57, 312-13. "Given the closed nature of the prison environment, and the reluctance of officers to testify against their peers" (*id.* at 5), complaints of sexual misconduct frequently went unredressed, and the complainants were punished. Indeed, in Michigan, virtually all women interviewed in connection with this HRW report and who complained about abuse were subsequently subjected to retaliatory abuse. HRW, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons* (1998).

II. The First Amendment Does not Permit Prisons to Punish Prisoners Solely for Criticizing Official Misconduct.

"There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1034-35 (1991) (Kennedy, J., dissenting). Censorship of such speech is inimical to the fundamental principle that the people retain the "right of free public discussion of the stewardship of public officials," (*New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964)), even though such criticism "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and officials." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) (*quoting Sullivan*, 376 U.S. at 270); *see also Sullivan,* 376 U.S. at 269-270, 274-76. Prisons are not exempt from this principle, as "prison walls do not form a barrier separating prisoners from the protections of the Constitution." *Turner v. Safley,* 482 U.S. at 84.

A. The Court has never permitted prisons to impose content or viewpoint-based restrictions on prisoners' speech.

While the First Amendment permits substantial restrictions on prisoners' speech (*Turner,* 482 U.S. at 89), the

Court has *never* approved the sort of content and viewpoint-based punishment at issue here. Decisions limiting prisoners' free speech rights have consistently emphasized that they upheld general, content-neutral limitations.

In *Turner*, the Court upheld a blanket prohibition on non-legal correspondence between prisoners in different prisons, and emphasized that "the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression. *See Pell v. Procunier*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. [520], at 551 [1979]." *Turner*, 482 U.S. at 90; *see Bell*, 441 U.S. at 551 (affirming a rule permitting receipt of hardback books only from the publisher, emphasizing that "[t]he rule operates in a neutral fashion, without regard to the content of the expression").

Similarly, the Court upheld a regulation barring prisoners from receiving publications containing information deemed detrimental to prison security (*Thornburgh v. Abbott*, 490 U.S. 401, 404-05 (1989)), and explained that the government must advance a "legitimate *and* neutral" interest, that is, one "unrelated to the suppression of expression." *Id.* at 415. The regulation satisfied the standard since it distinguished between publications "solely on the basis of their potential implications for security"--and not, in other words, based on whether or not authorities agreed with the message. *Id.*

By contrast, in the only case in which the Court has reviewed non-neutral restrictions on speech, it struck them down.[8] In *Martinez*, the Court concluded, "Prison officials may

[8]In *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), the Court upheld various restrictions on the *associational* activities of a prison labor union, but was careful to note that "First Amendment speech rights are barely implicated in this case." *Id.* at 130. Although the restrictions precluded "bulk mailings" of union literature--i.e., large bundles of newsletters to be distributed by prisoners--prison officials permitted receipt of these publications when mailed to individual prisoners. *Id.* at 130 n.7, 131 n.8.

not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." 416 U.S. at 414. Thus the Court invalidated outgoing mail regulations banning letters that "'unduly complain' or 'magnify grievances,' express[] 'inflammatory political, racial, religious or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate'" (416 U.S. at 415), since these regulations "were decidedly not 'neutral'." *Abbott*, 490 U.S. at 416 n.14. In so doing, the Court identified the inherent danger in such rules, noting that "some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism." *Martinez*, 416 U.S. at 415. That is precisely what happened in this case.

B. Under the standard of *Turner v. Safley*, punishment of prisoner speech about official misconduct violates the First Amendment.

Prison restrictions on speech will be upheld if they bear a reasonable relationship to a legitimate and neutral governmental interest unrelated to the suppression of expression. *Turner*, 482 U.S. at 89; *Abbott*, 490 U.S. at 415. While this standard permits significant limitations on prisoners' speech rights (*see Abbott*, 490 U.S. at 404), the "reasonableness standard is not toothless." *Id.*, at 414. It would, however, become meaningless if the Court determined that prison officials may punish prisoners for exchanging information about abuse by prison guards in the absence of any finding of falsity or malice, and when the prison already determined that the communication did not disrupt security. *See infra* at 21.

Nothing in *Turner* or the Court's other prison First Amendment decisions permits this result.

1. The prison punished Respondent's speech solely because it criticized official misconduct.

The prison portrays this case as though it involved a generic ban on inmate-inmate correspondence, akin to the rules in *Turner*. But the prison did *not* ban inmate-inmate correspondence generally (Joint Appendix ("JA") 36-37; Brief of Petitioner at 6), nor did it ban inmate law clerks from writing to other inmates. Thus Mr. Murphy was not disciplined pursuant to a neutral rule, but rather was singled out for punishment exclusively because of the *content* of his speech. Since the prison persistently mischaracterizes the nature of these rules, we must clarify the actual regulations involved.[9]

Upon learning that Pat Tracy, another prisoner, had been criminally charged with assault on Officer Galle, Mr. Murphy wrote Mr. Tracy a letter describing other misconduct by Officer Galle. JA 50-51. This conduct--sexual advances towards prisoners and retaliation---would, if it occurred, violate prison rules and probably criminal laws.[10] The mail censor, Officer Shaw, read the letter. JA 52, 54, 57. There is no evidence that he forwarded the allegations of misconduct to his superiors, or that the prison investigated Mr. Murphy's complaints. Instead, Officer Shaw charged Mr. Murphy with

---

[9]Mr. Murphy does not challenge the facial validity of the rules, other than on vagueness grounds, *infra* Point IV. Rather, he challenges these rules as applied to his particular communication with Mr. Tracy.

[10]Sexual abuse and harassment of prisoners by staff is a persistent problem. *See e.g. Mathie v. Fries*, 121 F.3d 808, 810-11 (2d Cir. 1997) (guard sodomized and harassed male inmate); *Downey v. Denton City*, 119 F.3d 381,384 (5th Cir. 1997) (female prisoner raped and impregnated by guard); *see generally* HRW, *Sexual Abuse, supra*.

three disciplinary infractions: "Insolence", "Interference with Due Process Hearings," and "Conduct Which Disrupts or Interferes With the Security or Orderly Operation of the Institution." JA 14-15 52, 54, 57. Mr. Murphy was found guilty of the first two charges. However, he was acquitted of the interference with security charge. JA 59-62.

The disciplinary charges that were sustained make clear that discipline was based exclusively on the *contents* of the letter. The "Insolence" violation charged:

> DESCRIPTION OF ALLEGED VIOLATIONS: While routinely monitoring Institutional mail, I (CS Shaw) noticed statements in a letter from Inmate Murphy to Inmate Tracy. In this letter, Inmate Murphy accused CO Galle of being an overzealous guard who punishes and harasses inmates for personal pleasure. Inmate Murphy also accused CO Galle of making homosexual advances towards inmates. Inmate Murphy stated that CO Galle retaliated against Murphy by writing him up on two rule infractions. [JA 52].

The hearing officer sustained the charge on the grounds that "Evidence states C/O Galle retaliated against Murphy by Issuing Inmate Murphy a Class II infraction. That statement indicates unprofessional actions which tend to intimidate the employee." JA 60.

The charge for "Interference with Due Process Hearings" read:

> DESCRIPTION OF ALLEGED VIOLATION: While routinely monitoring institutional mail I (CS Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy concerning an incident that had occurred with an assault on CO Galle. In this letter Murphy tries

> to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to 'do something' about CO Galle, but he (Murphy) was retaliated against. There is no evidence of any of the statements in this letter to be fact. [JA 54].

The hearing officer sustained the charge on different grounds: "The statement referring to C/O Galle making homosexual advances to another inmate would result in disciplinary action against stated employees of the DOC." JA 62.

Plainly, these charges are not grounded in any general ban on inmate-inmate correspondence, nor the rules of the law clerk program. Mr. Murphy's only wrongdoing, in the prison's eyes, was to discuss an officer's misconduct in an otherwise-lawful communication.

2. Punishment on this basis is not rationally related to a neutral, legitimate government interest.

Under *Turner*, the prison's punishment is not reasonably related to "legitimate and neutral" governmental objectives, and is instead an exaggerated response to the prison's concerns. The prison advances three interests in support of the discipline: protecting officers from learning of prisoner complaints about their misconduct; preventing prisoners from communicating information about official misconduct that may be relevant to a court proceeding;[11] and maintaining security.

First, in the disciplinary proceedings, the prison defended the discipline based on its interest in preventing

---

[11]We address this interest in Point III, *infra*.

officers from hearing prisoner's allegations of misconduct, finding that Mr. Murphy's letter alleged "unprofessional actions which tend to intimidate the employee" (JA 60) and conduct that, if true, would subject the guard to discipline. JA 62. This turns the notion of a "legitimate" objective on its head, for the government has *no* legitimate interest in permitting an employee to escape disciplinary action where misconduct has occurred. "Criticism of [a government officer's] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Sullivan*, 376 U.S. at 273. Yet this is essentially what prison officials urge here--that the Court approve of their interest in suppressing allegations of staff misconduct.

It is dubious at best whether the prison has a legitimate interest in protecting prison staff from derogatory communications about themselves. Law enforcement and other government officials must be prepared to tolerate even harsh and strident criticism. *See Houston v. Hill*, 482 U.S. 451, 461 (1987) ("the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," including speech that is "provocative and challenging"); *see also Sullivan*, 376 U.S. at 273 ("If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials."). While such comments, if made face to face, may present a risk of disorder in the sometimes volatile atmosphere of a prison, no such danger is presented when a prison staff member simply reads a letter in the ordinary course of a monitoring scheme. Moreover, at bottom, this governmental objective is aimed at suppressing speech, however much defendants talk about its effects on the listener rather than the speaker. As such, it is precisely the type of *non-neutral* objective "related to suppression of expression" that does *not* permit limitations on speech. *See supra* at 18.

But even if the prison had a legitimate interest in protecting officers from hearing prisoners' complaints, imposing discipline on *any* prisoner speech critical of an officer is an exaggerated response to that concern. It sweeps far too broadly, censoring speech that the officer may never, or need never, hear. Here, the critical speech was not made to or in the hearing of Officer Galle, but rather was sent in a private letter intended to be read only by the prison censor and Mr. Tracy. As the Ninth Circuit correctly noted, the "easy, obvious" alternative way for the prison to protect the officer from a complaint is simply not to tell him about it. Appendix to Petition for Certiorari ("Cert. App.") 14.

Second, the prison maintains that the discipline was reasonably related to its general interest in security. The prison relies almost exclusively on *Turner's* approval of a ban on inmate-inmate correspondence for security reasons. But this is misplaced, for there was no such ban here. Yet the only record evidence on "security" discusses the "Inmate Correspondence Policy" (the generic rule permitting the prison to review and censor certain mail), which is *not* at issue here since Mr. Murphy was not charged with violating that policy and it does not prohibit the conduct in which he engaged.[12] The issue is whether legitimate security concerns permit punishing Mr. Murphy under the Insolence and Due Process rules *because his*

[12]The Magistrate Judge below concluded that the prison had not shown a rational relationship between the discipline and a legitimate penological objective. Cert . App. 39. The prison then submitted the affidavit of Warden Mahoney, which states that the "Inmate Correspondence policy" (Policy 16-001, JA 34-49) furthers security by permitting the facility to review prisoner mail to prisoners in maximum security. JA 96-97. The district court, in rejecting the Magistrate's report, summarily concluded that "there is a valid, rational connection between the inmate correspondence policy and the objectives of prison order, security and inmate rehabilitation,"(Cert. App. 25), without noticing that the policy was not at issue.

letter was critical of authorities. The prison adduced *no* evidence demonstrating how such punishment was related to legitimate security interests.[13]

Nor can the prison make this showing, for punishing a prisoner for peaceful speech that criticizes an officer, without any showing that the speech is false or malicious, is an exaggerated response to legitimate security interests. The prison does not suggest that there is a direct threat to security from all prisoner reports of staff misconduct; indeed, reporting of misconduct would appear to be essential to ensuring the accountability of staff and the integrity of the institution.

The concerns over the content of critical speech are thus qualitatively different from the prison's legitimate concerns over speech that is genuinely hazardous to security, such as escape plans or illegal activity. The prison is entitled to impose reasonable time, place and manner restrictions on speech in general, including complaints about official misconduct, in order to ensure order and security. But this prisoner voiced his concerns peacefully in a letter not directed either to the offending guard, or to anyone other than Mr. Tracy, and not in violation of prison correspondence rules. The prison does not suggest that this mode of delivery threatened security any more

[13]This is in stark contrast to the evidence adduced in *Turner* establishing the connection between legitimate security concerns and the ban on non-legal inmate-inmate correspondence there. At the trial in *Turner*, the state presented evidence of a growing and significant problem with gang activity, the specific needs of the facility since it was designated to house protective custody inmates, and the manner in which the limitations on correspondence were connected to these security concerns. 482 U.S. at 91. The state also adduced evidence of the potential harmful effects of permitting such correspondence, and demonstrated how the correspondence directly threatened the core interests of maintaining safety. *Id.* at 92. There has been *no* analogous showing here of any relationship between security and punishment of speech about abuse by prison staff.

than had Mr. Murphy delivered the same message in another manner, such as simply talking with a prisoner. A complete prohibition on speech that, in and of itself, poses no cognizable security threat, is an exaggerated response to concerns over maintaining order.

III. The Punishment Violated the First Amendment Right to Engage in Speech Concerning Litigation.

The Ninth Circuit held that Mr. Murphy, as a law clerk designated by prison officials, had a First Amendment right to assist Mr. Tracy with his pending legal matter. This is correct, though the emphasis on his status as a law clerk is unnecessary. Any prisoner who had information relevant to Mr. Tracy's defense had a right to communicate it to him, absent a neutral, non-content-based rule prohibiting the correspondence.

This right is not necessarily grounded on a right of court access, recently addressed by this Court in *Lewis v. Casey,* 518 U.S. 343 (1996). Mr. Murphy asserted a court access claim, but the appeals court did not rule on it. Cert. App. 15. Rather, our analysis rests on the more general right to freedom of speech, which protects speech about litigation just as it does speech about any other subject. *See Rizzo v. Dawson,* 778 F.2d 527, 531 (9th Cir. 1985), *citing NAACP v. Button*, 371 U.S. 415 (1963). Mr. Murphy's exercise of that right in connection with Mr. Tracy's pending case is therefore protected in the same manner as would be, e.g., stating his support for a Presidential candidate or his opposition to a legislative proposal. That point is especially pertinent given the nature of his communication. He was not purporting to draft legal papers, perform legal research, or advocate for Mr. Tracy; he merely offered information that he believed relevant to Tracy's defense.

There is an important difference between a claim about speech concerning litigation and a claim about access to courts.

The right of access to courts enjoyed by persons the state has incarcerated, as explicated by this court in *Lewis v. Casey,* places an affirmative obligation on the state to assist those persons who have non-frivolous legal claims related to their incarceration in presenting those claims to courts.[14] The more general right of free speech extends to all persons and all subjects, but places no obligation on government to assist the speaker. It is that aspect of the free speech right that was abridged by the prison officials in this case.

The Court of Appeals correctly concluded that, under *Turner,* the discipline of Mr. Murphy was not rationally related to a legitimate, neutral government objective. The court did not rely significantly on his status as a law clerk in this analysis, but rather, it focused on the nature of the communication and the risks it allegedly posed to the prison's interests. It observed that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." Cert. App. 12. Mr. Murphy had no other way to communicate to Mr. Tracy the information he had for Mr. Tracy's defense counsel. There would be no impact on prison staff, other prisoners, or prison resources from delivering that correspondence, and certainly none from refraining from punishing him for it; he does not dispute the prison's right to read such correspondence and intercept it if it contains matter that is genuinely hazardous to legitimate penological interests. Such monitoring imposes no additional burden on prison officials. Cert. App.13-14. The easy, obvious alternative to protect staff from derogatory communications about themselves is to have the correspondence read by someone else -- as they already do. Cert. App.14.

---

[14]There is a broader right of all persons to be free of governmental obstruction of their access to courts. *Ryland v. Shapiro,* 708 F.2d 967, 971 (8th Cir. 1983), *citing Chambers v. Baltimore & Ohio R.*, 207 U.S. 142, 148 (1907). That right is not at issue in this case.

In that context, Mr. Murphy's law clerk status only buttresses the appeals court's conclusion. It shows that the prison saw no need to bar prisoners from helping each other with legal matters, and indeed that Mr. Murphy was a person whom they deemed qualified, and assigned, to engage in precisely that sort of communication. Along with the fact that the prison did not prohibit other correspondence with prisoners in the high security compound, these facts show that nothing about Mr. Murphy's communication presented any threat to legitimate prison management concerns.

IV. The Punishment of Respondent Denied Due Process Since the Rules Do Not Give Adequate Notice That They Forbid Speech about Staff Misconduct.

The discipline of Mr. Murphy also denies due process because the rules under which he was disciplined are impermissibly vague as applied to his conduct, and thus fail to give "fair notice to those to whom [they are] directed." *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (citations omitted).[15] The vagueness doctrine serves to

> eliminate the impermissible risk of discriminatory enforcement [citations omitted], for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred. . . but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.

Gentile, 501 U.S. at 1050; *accord Reno v. American Civil*

[15]Mr. Murphy alleged that the rules were vague as applied to his conduct, but the Ninth Circuit did not reach this question, concluding only that the regulations were facially valid. Cert. App. 15-16.

Liberties Union, 521 U.S. 844, 871-72 (1997).[16]

Both rules invoked to punish Mr. Murphy fail on these grounds. First, the prison relied upon the insolence rule, which forbids "words, actions or other behavior which is intended to harass or cause alarm in an employee" and "cursing; abusive language, writing or gestures directed to an employee." JA 10. But Mr. Murphy's statements were not "directed to" Officer Galle; rather, they were made in a private letter to Mr. Tracy, intended to be read only by Mr. Tracy and the prison mail censor. He could not have known that statements made entirely out of earshot and view of Officer Galle would be deemed insolence. Nor is there any evidence that they were "intended to harass or cause alarm" in Officer Galle.[17] JA 59, 61. The prison's expansive view of the regulation would mean that any time a prisoner complained about a corrections officer to *anyone*, he would be deemed "Insolent."

The prison also concluded that Mr. Murphy violated the rule against "Interference with Due Process Hearings." JA 61. That rule prohibits "Intimidating or tampering with an informant or witness; tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff which could result in a disciplinary violation."

[16]Although the Court has applied the vagueness doctrine less rigorously outside the context of criminal law, *see NEA v. Finley*, 118 S. Ct. 2168, 2179 (1998), the penalties imposed in prison, such as isolated punitive confinement, are "more akin to criminal rather than civil penalties." *Chatin v. Coombe*, 186 F.3d 82, 86 (2d Cir. 1999).

[17]The evidence against Mr. Murphy on both counts consisted solely of the infraction reports, JA 52, 54; Mr. Murphy's letter, JA 50; and his written statements, JA 59, 61. *See* JA 59, 61. None of these documents display any indication of intent to harass or cause alarm in Officer Galle (or any evidence that Mr. Murphy's statements were false).

JA 22. The prison contends that he violated the rule in two respects: by providing information to Mr. Tracy with respect to his court hearing (JA 54); and by stating that Officer Galle had retaliated against him and sexually harassed prisoners. JA 62.

Nothing in the rule notifies prisoners that it forbids exchanging relevant information about pending court cases. The rule appear to be addressed exclusively to internal proceedings, but even if it is not, it simply cannot be the basis for Mr. Murphy's discipline, as he had no way to know his letter to Mr. Tracy would violate this rule.

Nor can Mr. Murphy's statements be punished under the other prong of the rule, which prohibits "making a false statement of misconduct" against a staff member. Even in a prison disciplinary proceeding, there must be "some evidence" to support the charges. *Superintendent v. Hill*, 472 U.S. 445, 457 (1985).[18] There is no evidence whatsoever that Mr. Murphy's statements were false or malicious. *See* n.17, *supra*. Thus, the discipline imposed on Mr. Murphy is unconstitutional regardless of the Court's resolution of the substantive First Amendment issues presented.

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

[18]It is doubtful that "some evidence" would suffice, even in prison, to support punishment for speech addressing about official misconduct. *See New York Times v. Sullivan*, 376 U.S. at 285-86 (requiring "convincing clarity" and showing of actual malice to support defamation finding against public official). However, in this "no evidence" case, the Court need not reach the question.

Respectfully submitted,

DANIEL L. GREENBERG
JOHN BOSTON
Counsel of Record
MARY LYNNE WERLWAS
Legal Aid Society of New York

December 2000